EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

OFFICE OF FEDERAL
PROCUREMENT
POLICY

TESTIMONY OF DONALD E. SOWLE
ADMINISTRATOR FOR FEDERAL PROCUREMENT POLICY
BEFORE THE
ARMED SERVICES INVESTIGATIONS SUBCOMMITTEE
OF THE
U. S. HOUSE OF REPRESENTATIVES
COMMITTEE ON ARMED SERVICES

September 29, 1983

Mr. Chairman and Members of the Subcommittee:

Thank you for the opportunity to testify on H.R. 2545, the "Defense Procurement Reform Act of 1983." We support the thrust of H.R. 2545, which would amend the Armed Services Procurement Act to promote competition by eliminating the distinction between formal advertising and competitive negotiation; deleting the exceptions to formal advertising under which procurement is now negotiated; and limiting the conditions under which non-competitive procurement would be permitted. The bill would also remove fee limitations on contracts; permit multi-year contracting for all "services"; and provide multi-year authority for the National Aeronautics and Space Administration (NASA) and the Coast Guard. Finally, it would extend to NASA and the Coast Guard the statutory debarment and suspension procedures now applicable to the Department of Defense (DOD).

## Background

### Magnitude of Procurement

Approximately one-fifth of the total, annual Federal budget is used to purchase products and services from the private sector. In FY 1982, this was almost $160 billion, requiring 19 million contract actions. 130,000 people in nearly one hundred Federal agencies are involved, directly or indirectly, in awarding and administering these contracts. Many more are involved in the decisions which impact on the procurement process. Because of the magnitude of Federal procurement, it has long commanded the attention of public officials and private citizens. All too often, however, this attention has focused on individual abuses and inefficiencies, rather than on creating an overall system to support the agencies in carrying out their missions.

### Commission on Government Procurement

The first, comprehensive, high-level study devoted solely to the problems of Federal procurement was performed by the Congressional Commission on Government Procurement (COGP) in 1970-72. In establishing the Commission, Congress recognized that annual expenditures for procurement and attendant administrative costs are such that even small improvements

could yield large rewards and that a full-scale study of the problems which persisted in procurement was warranted.

The Commission made 149 recommendations for improving the procurement process in its Report to the Congress in December 1972. The Commission recommended a single statute, which would apply to all agencies, and would serve as the basis for a single, Government-wide procurement regulation.

The Commission found that one reason for public concern over the procurement process was the high proportion of non-competitive contracts awarded by the Government. The current statutes prescribe formal advertising as the preferred method of procurement and spell out the exceptions under which procurement may be negotiated. These exceptions to formal advertising, which were intended to permit negotiation, are frequently, though incorrectly, used as bases for non-competitive procurement. The fact is, competition is required even for negotiated procurements. However, the statutes do not contain any restrictions on the use of non-competitive procurement. Year after year, approximately one-third of the total procurement dollars spent are non-competitive. (This does not include follow-on procurements, which can be considered a form of competitive procurement.) Therefore, the Commission recommended some fundamental changes in the procurement statutes to give

contracting officers greater flexibility in seeking competition. They also recommended some statutory restrictions on non-competitive procurement.

Uniform Federal Procurement System

Since its creation in 1974, the Office of Federal Procurement Policy has been active in promoting competition in Government contracts. "New concepts of competition" was one of the four major themes in the Administration's Proposal for a Uniform Federal Procurement System (UFPS), which was submitted to Congress in February of last year. The proposal attacks the barriers to competition which exist throughout the entire procurement process, as well as in the statutes. The proposed procurement system would introduce new statutory concepts of competition, together with new methods to stimulate and expand the use of competition and to statutorily restrict non-competitive procurement to very special circumstances. Procurement under the UFPS would be either competitive or non-competitive, with an absolute preference for competition. Competition would be obtained through the use of sealed bids or competitive negotiation procedures. Circumstances under which a non-competitive contract could be awarded would be strictly limited by statute.

Presidential Interest

Following submission of the UFPS to Congress, President Reagan signed Executive Order 12352, "Federal Procurement Reforms," on March 17, 1982. The Order addressed those areas of procurement reform which could be dealt with administratively, including specific direction to the agencies to develop criteria to enhance competition and to limit non-competitive procurement.

More recently, on August 11th, as part of Reform '88 -- the President's six-year program to modernize management practices and to increase productivity in the Federal Government -- President Reagan issued a memorandum to the heads of the departments and agencies on competition in Federal procurement. The memorandum stated that "competition is fundamental to our free enterprise system" and that "it is the single most important source of innovation, efficiency and growth in our economy."

OFPP Policy Letter

In that memorandum, the President also directed me to issue policy to establish Government-wide restrictions on the use of non-competitive procedures. On August 12th, we issued for public comment a proposed policy letter on

non-competitive procurement. The proposed policy letter establishes specific circumstances under which non-competitive procurement must be justified; requires the agency Procurement Executives to establish approval procedures for non-competitive procurement; requires special control procedures for non-competitive awards resulting from unsolicited proposals; and requires that proposed, non-competitive procurement actions be published in the Commerce Business Daily, detailing the reason that there is no competition.

However, the non-competitive policy letter is just an interim measure for use until Congress makes the necessary statutory changes to establish new concepts of competition and to restrict non-competitive procurement.

**Recent Congressional Action**

Public Law 98-72

Public Law 98-72, which amends Section 8(e) of the Small Business Act, is one step in that direction. The Act prohibits Federal agencies from awarding a non-competitive contract or a contract that results from an unsolicited proposal, unless the head of the procuring activity or his deputy has approved the contract. The level of review is set at $1 million for FY 84; $500,000 for FY 85; and $300,000 for FY 86 and subsequent years.

S. 338

S. 338, the "Competition in Contracting Act of 1983," is currently pending in the Senate. H.R. 2545 is similar in some respects to S. 338, which the Administration supports, in that it would amend the Armed Services Procurement Act to provide a distinction between competitive procurement (sealed bids or competitive proposals) and non-competitive procurement and would place restrictions on the use of non-competitive procurement. However, S. 338 amends both the Federal Property and Administrative Services Act and the Armed Services Procurement Act and provides uniform coverage for both. In addition, S. 338 provides fewer circumstances under which non-competitive procurement could be justified.

**H. R. 2545**

H.R. 2545 is a step in the right direction, because it, too, places formal advertising and negotiated procurement on an equal basis and eliminates the need for determinations and findings previously required for competitively negotiated contracts. The emphasis on increased competition and the restrictions placed on non-competitive procurement comport with the Administration's efforts under Reform '88.

Section 3 provides needed amendments to the present Act by including the Department of Defense within the meaning of "head of an agency" and providing a concise statement of the coverage of the Act.

Section 4 provides conforming amendments to the Walsh-Healy Act and the Davis-Bacon Act, consistent with existing law.

Section 6 contains a number of amendments which we favor:

- It repeals unnecessary restraints on use of different types of contracts and eliminates the fee limitations imposed in contracts. I believe that strict compliance with competitive procedures and the careful scrutiny of non-competitive contracts will ensure reasonable fees.

- Section 6 makes changes in the Truth in Negotiations Act which are necessary to comport with the changes in procurement procedures. It allows cost or pricing data not otherwise covered by the Act to be requested when it is necessary for the evaluation of the reasonableness of price. I believe that it should also be requested to determine whether costs are reasonable.

We question leaving the threshold for application of the Act at $500,000. We consider $100,000 a more

reasonable threshold. Lowering this threshold to $100,000 would place little additional burden on the contractor, because, whether the contract being negotiated is $100,000 or $500,000, the contracting officer needs and will normally request accurate and complete supporting data. If, in implementing the Act, agencies were to impose the same audit requirements at $100,000 as are now imposed at $500,000, it would increase the burden on both the contractor and the Government. Absent this, the only added burden to the contractor is the requirement to certify the accuracy, currency and completeness of the data submitted. Any additional burden has not been demonstrated. It also seems reasonable to assume that the costs or prices a contractor or subcontractor quotes are developed in a systematic way and are based on factual data.

- Section 6 further expands multi-year coverage to all service contracts and provides multi-year authority for services, as well as products, for NASA and Coast Guard.

- This section also adds a new provision allowing annual funds (funds normally required to be obligated and expended within the fiscal year) to be used for 12 month service contracts which cross fiscal years. This

is a needed and welcome change. It would permit agencies to schedule the award of service contracts throughout the fiscal year to meet agency needs. Further, it would allow the agencies to distribute their workload more efficiently and permit more opportunity to obtain competition.

However, we do have some reservations concerning the bill:

o As I indicated previously, H.R. 2545, as written, amends only the Armed Services Procurement Act. In order to correct problems which exist across the Government, any modifications should be made in both the Armed Services Procurement Act and the Federal Property and Administrative Services Act. Modifications to only one statute would run counter to the efforts to create more uniformity in the Federal procurement process.

The Commission on Government Procurement found that there were more than 30 troublesome inconsistencies between the two Acts. Some of the inconsistencies stemmed from special problems originally encountered by only one or a limited number of agencies, but most of them arose simply because there were two basic procurement statutes which had been amended at different times

in different ways by different Committees, without adequate coordination of changes to achieve a uniform statutory base. The present statutory foundation consists of disparate, confusing restrictions and limited authority to avoid these restrictions. Therefore, the Commission recommended consolidation of the two procurement statutes as a major step in fostering a regulatory system that would encourage, rather than inhibit, those wishing to do business with the Government. It would also focus attention on procurement as a Government-wide operation and discourage accommodation of parochial interests. While procurement actions have taken place for more than 35 years under two statutes, we should at least take advantage of every opportunity to keep these dual statutes uniform.

- Section 2: The declaration of policy in Sec. 2 of H.R. 2545 would be applicable equally to procurement by DOD and the civil agencies. The section should include the policy of relying on the private sector to provide needed goods and services. Such a statement would be in keeping with Congressional and executive branch interest.

The policy also should encourage the development of a career management program to ensure the continuation of a fully professional work force. The success of the procurement system depends primarily upon the quality of the personnel supporting it.

o Section 4: This section defines the term "competitive procedures" as solicitations of sealed bids or solicitation of proposals from more than one source. However, the term "competitive proposals," which is used in the bill, does not appear in the definition of "competitive procedures." We believe that this is an oversight which should be corrected.

This section of the bill also provides 10 conditions under which non-competitive procedures may be used. We agree with the concept of placing restrictions on the use of non-competitive procurements. We note, however, that the language used to describe the conditions which would justify using non-competitive procurement closely parallels the language used in the present exceptions to formal advertising. We believe that use of the same or similar language is confusing and would tend to perpetuate some of the abuses that have occurred in the past. These exceptions to formal advertising provide the basis for negotiations, which can be either

competitive or non-competitive, and they do not focus on the present problems relating to non-competitive procurement. We believe that some changes are necessary in this area. The language needs to be tightened and clearly address only non-competitive situations.

For example, one of the conditions under which non-competitive procurement is permitted is when the head of the agency determines that it is necessary and not inconsistent with the public interest to award the contract on other than a competitive basis. This would provide a very broad, catch-all condition for not competing a contract. If such a condition is considered necessary, it should be very narrow in scope to properly limit the circumstances for non-competitive award. We and the major Federal procurement agencies would be pleased to work with the Committee in developing suitable language.

Section 4 also provides that the authority of the head of an agency to make this determination may be delegated to the general or flag officer level or to the SES rank. While we recognize that some of the Federal agencies may support this delegation of authority, we believe that these levels of approval are too low.

Such a determination should be made at the Secretarial level and should require a statement of rationale and strict accountability for the decision.

Section 4, further, provides authority for the Secretary of Defense to set the ceiling for small purchases for DOD, NASA and the Coast Guard. This would result in one ceiling being set for the military agencies and one for the civil agencies. Such disparate treatment of small purchases would complicate the analysis of reporting data and would also be contrary to increasing uniformity in the procurement system for the benefit of the Government and its suppliers.

o Section 5, covering contract award procedures, provides that competitively negotiated proposals "shall be solicited from a number of qualified sources consistent with the interests of the agency in effective and efficient competition." We agree that "effective" competition is an absolute requirement; however, we do not agree that "efficient" competition is a standard to be encouraged. Such a standard would permit a limitation on the number of proposers in the name of "efficiency" and, thereby, foreclose qualified proposers who may have a new, innovative, or creative proposal to offer.

Summary

In summary, we support the thrust of H.R. 2545. However, the sections which I discussed today illustrate our concerns with the bill. We would be pleased to work closely with your staff to further develop the bill along the lines I have outlined.

Mr. Chairman, this concludes my formal statement. I will be pleased to respond to any questions you may have.